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in the
Supreme Court
of the
United States

OCTOBER TERM, 1973

NO. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a division of
KNIGHT NEWSPAPERS, INC.,
Appellant,

v.

PAT L. TORNILLO, JR.,
Appellee.

On Appeal from the Supreme Court of Florida

JURISDICTIONAL STATEMENT

Appellant The Miami Herald Publishing Company, a division of Knight Newspapers, Inc. (*"The Miami Herald"*) appeals from the judgment of the Supreme Court of Florida entered on July 18, 1973, rehearing denied October 10, 1973, which reversed a decision of the Circuit Court of

Dade County, Florida and upheld the constitutionality of Section 104.38, Florida Statutes. This Jurisdictional Statement is submitted to show that the Supreme Court has jurisdiction of this Appeal and that substantial constitutional questions are presented which merit review by this Court.

OPINION BELOW

The initial opinion of the Florida Supreme Court dated July 18, 1973 and the opinion denying rehearing dated October 10, 1973 are not yet reported. The opinion of the Circuit Court of Dade County is reported at 38 Fla. Supp. 80 (1973). Copies of these three opinions are included in the Appendix to this Statement.

JURISDICTION

This action was brought by Appellee Pat L. Tornillo, Jr. ("Tornillo") against *The Miami Herald* for a mandatory injunction directing *The Miami Herald* to print verbatim a statement by Appellee and for damages based upon an alleged violation of Section 104.38, Florida Statutes, a criminal statute. On October 20, 1972, the Circuit Court for Dade County dismissed the Complaint, holding Section 104.38, Florida Statutes, to be in violation of the First and Fourteenth Amendments to the United States Constitution, and Article I of the Florida Constitution. Tornillo appealed directly to the Florida Supreme Court on November 3, 1972, and that Court reversed the decision of the Circuit Court and upheld the constitutionality of Section 104.38, Florida Statutes, in an opinion dated July 18, 1973. *The Miami Herald* filed a Petition for Rehearing, which was denied by the Supreme Court of Florida on October 10, 1973. *The Miami Herald* filed a

Notice of Appeal on November 1, 1973. A copy of the Notice of Appeal is included in the Appendix to this Statement. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, U.S.C., Section 1257(2). Although the Supreme Court of Florida remanded this case to the trial court for further proceedings, the opinion and judgment of the Florida Supreme Court are final for purposes of 28 U.S.C. §1257(2). The Florida Supreme Court conclusively decided the controlling constitutional issue, and its decision, which is binding upon the trial court, is therefore reviewable by this Court. *Mills v. Alabama*, 384 U.S. 214 (1966); *Hudson Distributors v. Lilly & Co.*, 377 U.S. 386 (1964); *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963).

QUESTION PRESENTED

Does Section 104.38, Florida Statutes, abridge freedom of the press and due process of law in violation of the First and Fourteenth Amendments to the United States Constitution by compelling a newspaper to provide free space, under criminal sanctions, to a candidate in any state election to reply to any publication in the newspaper which "assails [his] personal character," or charges him with "malfeasance or misfeasance" in office, or "otherwise attacks his official record"?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The Fourteenth Amendment to the United States Constitution provides, in part:

> ". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

The principal statute involved in this case is Section 104.38, Florida Statutes, which is part of the Florida Election Code:

> "§104.38 Newspaper assailing candidate in an election; space for reply. — If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083."

Sections 775.082 (5) and (6) and 775.083, which provide criminal sanctions for violations of §104.38, Fla. Stat., are reproduced in the Appendix to this Statement, together with Sections 97.021(1)-(4) and (18), which define the terms "election" and "candidate", as used in Section 104.38. No other terms contained in Section 104.38 are defined in the Florida Election Code.

Section 770.02, Fla. Stat., is a retraction statute which limits a plaintiff in a libel action to actual damages where, upon plaintiff's request, the publisher of the alleged defamatory statement prints a retraction. This Statute is also in the Appendix to this Statement.

STATEMENT OF THE CASE

In the fall of 1972, Tornillo was a candidate for the Democratic Party nomination for a seat in the Florida House of Representatives. On September 20, 1972 and September 29, 1972, *The Miami Herald* published editorials relating to Tornillo's candidacy. Copies of these editorials appear in the Appendix to this Statement.

On September 30, 1972, Tornillo requested *The Miami Herald* to print verbatim and free of cost a statement submitted by Tornillo, purportedly in reply to the editorials pursuant to Section 104.38, Florida Statutes. *The Miami Herald* did not print the material submitted by Tornillo. Tornillo did not request a retraction pursuant to §770.02, Fla. Stat., or otherwise claim that the editorials were libelous, untrue, or inaccurate.

On October 1, 1972, Tornillo filed a civil action in the Circuit Court for the Eleventh Judicial Circuit seeking to require *The Miami Herald* to publish his "reply," and to obtain damages. Circuit Judge Francis J. Christie held an emergency hearing on the matter on October 2, 1972. The Attorney General was notified of the suit pursuant to §86.091, Fla. Stat., requiring notice of any action in which a statute is alleged to be unconstitutional, and was represented at the hearing.

At the hearing, the Court was advised that the Attorney General had refused to appeal a decision by Volusia County Judge J. Robert Durden which had held §104.38 unconstitutional, because the Attorney General himself had reservations about the constitutionality of the statute. That case, *State v. News-Journal*, 36 Fla. Supp. 164 (Volusia County, Fla., Judges Ct. 1972) was apparently the first case brought under §104.38 since its enactment in 1913. A copy of the opinion in that case is contained in the Appendix to this Statement. The Attorney General advised Judge Christie that his opinion was unchanged since the *News-Journal* case, and that he continued to have doubts as the constitutionality of §104.38, and therefore would not defend the statute.

At the conclusion of the hearing, Judge Christie ordered Tornillo's case dismissed with prejudice, holding the statute void on its face as an impermissible restriction upon freedom of speech and press in violation of the First and Fourteenth Amendments to the Constitution of the United States and, in addition, denied due process of law under the Fourteenth Amendment because of its vagueness and ambiguity.

Tornillo appealed the judgment of the Circuit Court directly to the Supreme Court of Florida. The Attorney General of Florida filed a brief urging affirmance of the Circuit Court's decision. Amicus curiae briefs urging affirmance of the Circuit Court's judgment were also filed by the American Civil Liberties Union of Florida, Inc. and Times Publishing Company, publisher of two daily newspapers, the *St. Petersburg Times* and the *St. Petersburg Independent*. Donald U. Sessions, an attorney acting on his own behalf, filed an amicus curiae brief urging reversal.

On July 10, 1973, the Supreme Court of Florida rendered an Opinion, *per curiam*, which reversed the Circuit Court and upheld the validity of §104.38, Fla. Stat., finding that the statute did not violate the Constitutions of the United States or of Florida. One Justice dissented. On August 2, 1973, *The Miami Herald* filed a Petition for Rehearing. Twenty-two Florida newspaper publishers filed amicus curiae briefs urging the Court to grant the Petition and reverse its initial decision. The Attorney General of Florida filed a second Brief advancing similar views.

The Petition for Rehearing was denied in a *per curiam* opinion dated October 10, 1973, one Justice again dissenting. On November 1, 1973, *The Miami Herald* filed a Notice of Appeal to the Supreme Court of the United States.

THE QUESTIONS ARE SUBSTANTIAL

Introduction

This appeal involves the constitutionality of a novel form of governmental regulation of the press which is ostensibly designed to promote fairness in elections, but which in fact represents a severe restraint upon the exercise of journalistic discretion by putting the government in the editor's chair. In essence, the Florida statute in question conditions a newspaper's right to print editorials, news stories, advertising, or any other matter bearing unfavorably upon political candidates by requiring that if such matter is printed, the newspaper must offer the

candidates free space for a "reply." Violations of the statute are punishable as misdemeanors of the first degree. The Florida Supreme Court has also held that the statute may be invoked as the basis for a private action for mandatory injunction and damages.

The issues presented by this case have fundamental and far-reaching implications. Tornillo has asserted that the Florida statute is not only consistent with the First Amendment, but essential to providing him and others similarly situated with a means of publicly expressing their political views. Tornillo has sought to bring himself within the ambit of the Federal Communications Act's fairness doctrine and the personal attack rules of the Federal Communications Commission, urging that these doctrines can and should be applied to newspapers.

By contrast, *The Miami Herald's* position below and before this Court is that the "right of reply" statute represents an abridgement of a basic and vital constitutional protection provided to the press by the First Amendment. By its terms, the statute imposes governmental controls on editorial decisions to publish critical stories about political candidates. Such controls directly threaten journalistic integrity and weaken freedom of expression. The *per curiam* decision of the Supreme Court of Florida upholding the reply statute is thus in fundamental and irreconcilable conflict with the principles underlying this Court's decision in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, ____ U.S. ____, 36 L.Ed.2d 772 (1973) and the decisions of other courts. Governmental regulation of the content of newspapers by requiring publication, in the absence of compelling state

interests, is no less an unconstitutional restraint than governmental prohibition upon publication. The attempted analogy between newspapers and telecommunications media, if upheld, would eradicate the long recognized distinction between permissible regulation of print media and the electronic media. Censorship of newspapers in the guise of promoting fairness by requiring a right of "reply" or "access" is, nevertheless, censorship. As such, it is the exact opposite of the freedom of speech and press guaranteed by the First Amendment.

Even assuming that a State might legislate some form of access to the press without violating the guarantees of freedom of expression provided in the First Amendment, the Florida criminal statute at issue in this case is inconsistent both with the First Amendment guarantees of a free press and the due process rights in the Fourteenth Amendment, because the statute is excessively broad, vague, and ambiguous. The Florida Supreme Court attempted to cure some of the more obvious constitutional defects in the statute through interpretation, but the effort simply revealed more clearly the vices of the statute.

A. The Florida Statute which Requires the Press to Publish a Reply as a condition to Publishing Matter Critical of Political Candidates Violates the First Amendment

1. *The Decision below is in conflict with the rationale of prior cases.*

This Court has never ruled directly upon a state statute requiring newspaper publication of a "reply." The

fundamental question is whether the editorial discretion of newspapers may be constitutionally circumscribed by governmental regulation which compels publication. In *Columbia Broadcasting System*, this Court held that a broadcaster may not be forced to accept paid political advertising, concluding that governmental intrusion upon the exercise of "journalistic discretion" to determine what should or should not be published contravenes the "rigid limitations" of the First Amendment. Similarly, other federal courts, including three Circuit Courts of Appeal, have uniformly rejected any notion that the First Amendment permits the adoption of governmental regulation which compels a newspaper to publish material against its will.

The arguments advanced by Tornillo in the proceedings below were essentially similar to those made and rejected in *Chicago Joint Board, Amal. Cloth. Workers v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970). In that case, the newspaper refused to publish advertisements submitted to it by the union, which presented the union's views on a labor dispute in which it was engaged.

> "It is urged that the privilege of First Amendment protection afforded a newspaper carries with it a reciprocal obligation to serve as a public forum, and if a newspaper accepts any editorial advertising it must publish all lawful editorial advertisements tendered to it for publication at its established rates. We do not understand this to be the concept of freedom of the press recognized in the First Amendment. The First Amendment guarantees of free expression, oral or printed, exist for all . . . The Union's right to free speech

> does not give it the right to make use of the defendants' printing presses and distribution systems without defendants' consent." *Id.* at 478.

The union's petition for certiorari was denied. 402 U.S. 973 (1971).

The constitutional issues involved in an attempt to compel a newspaper to publish were also squarely faced by the Ninth Circuit Court of Appeals in *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971). In that case, a movie distributor claimed that its First Amendment rights were violated by the newspaper's refusal to accept certain proffered advertising without modifications requested by the newspaper. The Ninth Circuit firmly dismissed the would-be advertiser's claim of infringement of First Amendment rights.

> "Appellant has not convinced us that the Courts or any other governmental agency should dictate the contents of a newspaper." *Id.* at 135 (footnote om.).

A similar result was reached in *Avins v. Rutgers, State University of New Jersey*, 385 F.2d 151 (3rd Cir. 1967). The plaintiff in that case sought to compel the Rutgers Law Review to publish an article which it had previously rejected. The Third Circuit Court of Appeals affirmed the District Court's decision, refusing to order publication even in a state-supported publication.

> "The right to freedom of speech does not open every avenue to one who desires to use a particu-

> lar outlet for expression . . . Nor does freedom of speech comprehend the right to speak on any subject at any time . . . [Plaintiff] does not have the right, constitutional or otherwise, to commandeer the press and columns of the Rutgers Law Review for the publication of his article, at the expense of the subscribers to the Review and the New Jersey taxpayers, to the exclusion of other articles deemed by the editors to be more suitable for publication. On the contrary, the acceptance or rejection of articles submitted for publication in a law school law review necessarily involves the exercise of editorial judgment and this is in no wise lessened by the fact that the law review is supported, at least in part by the State." *Id.* at 153-54.

Accord, Resident Participation of Denver, Inc. v. Love, 322 F.Supp 1100 (D.Col. 1971).*

While the precise form of governmental regulation at issue here may differ from that involved in *Columbia Broadcasting System* and the cases discussed above, the

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*Without resorting to constitutional grounds, numerous other cases have rejected the concept that a newspaper should be considered to be a "public utility" compelled to accept and publish all advertising proffered to it. *E.g., McGill v. State*, 209 Ga. 500, 74 S.E.2d 78, 81-82 (1953); *Chronicle & Gazette Pub. Co., Inc. v. Attorney General*, 94 N.H. 148, 48 A.2d 478, 482 (1946), *appeal dismissed*, 329 U.S. 690 (1947); *Shuck v. Carroll Daily Herald*, 215 Iowa 1276, 247 N.W. 813 (1933); *In re Louis Wohl*, 50 F.2d 254, 255 (E.D. Mich. 1931); *Friedenburg v. Times Pub. Co.*, 170 La. 3, 127 So. 345 (1930); *Poughkeepsie Buying Service, Inc. v. Poughkeepsie Newspapers, Inc.*, 205 Misc. 982, 131 N.Y.S.2d 515 (1954); *see Associated Press v. U.S.*, 326 U.S. 1, 19 (1945).

question presented is exactly the same: whether newspapers may be required to publish (either as a "reply" or directly), advertisements, editorials, and articles which in the exercise of editorial judgment would not otherwise be printed. Section 104.38, Fla. Stat., curtails the exercise of journalistic discretion in the determination of what will be published in exactly the same fashion as the demands made in *Columbia Broadcasting System*, and kindred cases. In terms of the exercise of editorial judgment and the maintenance of journalistic integrity, the distinction between a demand for a "right of reply" such as that involved here and in Chicago *Joint Board, Amal. Cloth. Workers, supra*, and for "access" such as that raised in *Avins, supra*, is one without a difference. Both manifestly require the suspension of editorial discretion and permit the government through regulation to "commandeer the press and columns" of newspapers and thereby dictate the contents of those columns.

Columbia Broadcasting System and similar cases unmistakably hold that deciding what to publish and what not to publish rests within journalistic discretion which is protected against any governmental intrusion by the First Amendment. The Florida Supreme Court, upholding the constitutionality of §104.38, Fla.Stat., espoused a diametrically opposite view—that decisions by newspapers as to what they will publish may be suspended or abridged by governmental regulation. The Florida Supreme Court's view of the protections accorded by the First Amendment to newspapers in this case is in basic and irreconcilable conflict with the scope of that protection as expressed in *Columbia Broadcasting System* and kindred cases.

2. *Governmental regulations requiring publication must meet the same constitutional standards as regulations prohibiting publication.*

The Florida Supreme Court's decision conflicts with the rationale of this Court in *Columbia Broadcasting System* because of its conclusion that regulations which affirmatively require publication somehow stand on a different constitutional footing than regulations prohibiting publication. The decision below rests in large measure upon this supposed distinction between these two types of regulations. For example, the Florida Supreme Court specifically states that §104.38, Fla. Stat., "does not consitute an incursion upon First Amendment rights or a prior restraint, since no *specified newspaper content is excluded.*" (App. 8) (Emphasis in the original.) Thus, the Florida Supreme Court concluded that the statute at issue here, because it compels rather than prohibits publication, is not repugnant to the First Amendment.

The First Amendment admits of no such distinction. As the Ninth Circuit Court of Appeals stated in *Associates & Aldrich Co. v. Times Mirror Co., supra*, "There is no difference between compelling publication of material that the newspaper wishes not to print and prohibiting a newspaper from printing news or other material." 440 F.2d at 135.

The majority of decisions in this Court which have tested various statutes against the First Amendment guarantees have been in cases involving statutory restrictions upon publication. Unless these restrictions have been justified by a clear and present danger to a compelling state

interest, the statutes have consistently been voided. E.g., *Terminello v. Chicago*, 337 U.S. 1 (1949); *Musser v. Utah*, 333 U.S. 95 (1948); *Lovell v. Griffin*, 303 U.S. 444 (1938).

> "The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government." *New York Times Co. v. United States*, 403 U.S. 713, 717 (Justice Black concurring) (1971).

Just as the First Amendment forbids unwarranted censorship of the press which would prohibit or restrain publication, a statute compelling a newspaper to publish specific information also violates the First Amendment. Both types of regulations "fetter" the maintenance of journalistic integrity and affect "the impartial distribution of news," *Associated Press v. NLRB*, 301 U.S. 103, 133 (1973). Thus in sustaining a decree forbidding monopolistic activities of a press association, this Court carefully pointed out that the decree did "not compel AP or its members to permit publication of anything which their 'reason' tells them should not be published." *Associated Press v. U.S.*, *supra* at 20. Just as a State cannot prohibit publication in the absence of a clear and present danger to a compelling state interest, a state may not become an editor and compel publication. "[L]iberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper." II Chafee, *Government and Mass Communications* 633 (1947).

3. There is no compelling state interest which justifies the intrusions which the Florida statute makes upon freedom of expression guaranteed by the First Amendment.

First Amendment freedoms may not be impinged upon unless there is a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. *E.g., Bridges v. California*, 314 U.S. 252, 262-63 (1941); *Craig v. Harney*, 331 U.S. 367 (1947). Statutes prohibiting any type of publication, particularly criminal statutes, are presumed unconstitutional unless it can be demonstrated that the infringement is justified by a "clear and present danger" to a critical public interest. *E.g., Thomas v. Collins*, 323 U.S. 516, 530 (1945); *Associated Press v. U.S.*, *supra* at 7.

Although there is no available legislative history for the 1913 Florida statute, the Supreme Court of Florida discussed two possible objectives of the statute which were used to justify its constitutionality. First, the Florida Supreme Court cited a proper legislative purpose in ensuring fair elections. This objective is insufficient basis for upholding the statute. This Court held in *Mills v. Alabama*, *supra*, that the reasonableness of a state's interest in fair elections cannot justify a criminal statute restricting the contents of a newspaper. *Mills* was ignored by the Supreme Court of Florida.

The second attempted justification of the statute was as a counter to alleged monopolization and concentration in the media. Even if the monopolization and concentration issues had properly been before the Florida Supreme Court, these issues would have provided no justification for up-

holding §104.38, Fla. Stat.* The Supreme Judicial Court of Massachusetts so ruled in a recent advisory opinion on the constitutionality of a proposed right of access statute.

> "The situation at which §39A [the proposed statute] is directed may be the 'monopolistic status' of certain news publications. However, complusion to publish all responsive political advertisements, applicable to all newspapers and other publications of general circulation in the Commonwealth, goes beyond what is essential to the furtherance of any interest of a State in its citizens having a right of access to newspapers in order to express, at their expense, political ideas which otherwise would not be published. See Barron, Access to the Press — A New First Amendment Right, 80 Harv. L. Rev. 1641, 1676-1678. Indeed no set of circumstances may exist which would support a legislative mandate that a newspaper or other publication of general circulation must publish a political advertisement. The views expressed and implied in the opinion of the court and in the dissenting opinions in the *Pittsburgh Press Co.* case, *supra*, [*Pittsburgh Press Co. v. Pittsburgh Committee on Human Relations*, ____ U.S. ____, 37 L.Ed.2d 669 (1973)] create substantial doubt that such legislation would pass

*The Florida Supreme Court's contention on this issue went totally beyond the issues raised by the Record in the case before that Court, or the Briefs of the parties filed in that Court. The sole factual support for the Court's contention was a magazine article appended to an Amicus Curiae Brief filed by an attorney on his own behalf. The Florida Supreme Court had never before taken judicial notice of such an article, much less given it substantive weight. In so doing, the Court violated its own rules, and abridged fundamental due process.

constitutional muster." *Opinion of the Justices*, 298 N.E.2d 829, 835 (Mass. 1973) (footnote om.).

Similar arguments of lack of access were asserted in *Resident Participation of Denver, Inc. v. Love*, *supra*, but the three-judge Court rejected the contention that newspapers can constitutionally be required to furnish free space for expression of views of citizens.

> "We are aware that lack of access to those media which reach large audiences has, some believe, given birth to a frustration which compels otherwise peaceful citizens to engage in violence to get their views to the nation. A cause of this frustration, one critic maintains, is that, although the courts have been vigorous in protecting free speech, they have been indifferent to creating opportunities for expression. Barron, Access to the Press — A New First Amendment Right, 80 Harv.L.Rev. 1641 (1967). We note, however, that while Professor Barron spends considerable space exploring a statutory solution to this problem, he devotes much less attention to constitutional arguments and but one paragraph to the problem of state action, which we find insurmountable. Professor Barron simply concludes, without noticeable explanation, that newspapers can be subjected to the 'constitutional restrictions which quasi-public status invites.' *Id.* at 1669. As desirable as this result might be, we are unable in good faith to reach it." 322 F.Supp. at 1105.

The separate opinion of Justice Douglas in *Columbia Broadcasting* likewise recognized and disposed of the con-

tention that alleged concentration in the media can be cured by a government *fiat* to be fair.

> "Thomas I. Emerson, our leading First Amendment scholar has stated that
>
> '. . . any effort to solve the broader problems of a monopoly press by forcing newspapers to cover all "newsworthy" events and print all viewpoints, under the watchful eyes of petty public officials, is likely to undermine such independence as the press now shows without achieving any real diversity.' The System of Freedom of Expression (1970), p. 671." ____ U.S. at ____, 36 L.Ed.2d at 811.

In addition to §104.38, there appear to have been only two similar "right of reply" statutes enacted in the United States. *Miss. Code Ann.* §3175 (1942) and *Nev.Rev. Stat.* §200.570 (1963).* The Mississippi statute was eviscerated in *Manasco v. Walley*, 63 So.2d 91 (Miss. 1953), which held that the statute could be invoked only if the publication concerning the candidate was *libelous*, even though the statute by its terms is invoked by a publication "reflect[ing] upon the honesty, integrity or moral character" of a candidate. *Id.* at 96. Nevada repealed its mandatory "right of reply" statute in 1969, and replaced it

*In addition, *Wis. Stat.* §895.05 provides that publication of a reply in lieu of a retraction prohibits a recovery against a newspaper in a defamation action other than actual damages. There is, furthermore, a fundamental difference between a right of retraction statute and the right of reply statute at issue here: the former is permissive, mitigating damages if a retraction is made and thus intended to encourage freedom of expression; the reply statute by contrast, is mandatory, with penal sanctions, and is designed to control the exercise of editorial discretion.

with a retraction statute. Ch. 310, Laws of Nevada, Fifty-Fifth Session (Act of April 14, 1969). The paucity of such legislation and the history of the few statutes that have been enacted illustrates the lack of necessity for "right of reply" or "access" to ensure that a diversity of views and ideas are disseminated among the people. Such legislation is inimical to our system of freedom of expression. Nevertheless, if the decision of the Florida Supreme Court is not reversed, it is likely that other States will consider similar statutes in a misguided effort to legislate fairness.

For these reasons, the solution to "the broader problems of a monopoly press" do not lie, as the Florida Supreme Court mistakenly conceived, in the imposition of regulations which substitute the government for the editor in the determination of what should be published. Indeed, as the Supreme Judicial Court of Massachusetts made plain in its *Opinion, supra*, there are "no set of circumstances . . . which would support a legislative mandate that a newspaper . . . must publish."

4. *The Florida Supreme Court's attempted analogy between permissible regulation of the press and of the broadcast media is invidious.*

Whatever continuing validity may inhere in the decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), this Court's subsequent decision in *Columbia Broadcasting System* leaves no doubt that the fairness doctrine is applicable and constitutionally permissible, if at all, solely and exclusively in the context of the broadcast media. It has long been recognized that differences between the media may justify differences in the extent to which First Amendment protections are accorded.

Burstyn v. Wilson, 343 U.S. 495 (1952). It may well be that *Red Lion*, *supra*, represents the outer limit of permissible governmental regulation of the content of radio and television station broadcasts, as this Court suggested in *Columbia Broadcasting System*. In any event, as Professor Emerson points out in his discussion of the significance of the *Red Lion* decision,

> "Government regulation designed to promote the system of freedom of expression takes on quite a different cast when it is applied to media of communication other than radio and television." *Emerson, The System of Freedom of Expression* 667 (1970).

The Florida Supreme Court's decision simply overlooks the fundamental constitutional distinction between the broadcast media and the press. In a remarkable analysis, the Court asserted that newspapers are subject to the same regulation as broadcast media because newspapers make use of the airwaves in their operations through telegraphs and other means of telecommunication. (App. 18) Carried to its logical conclusion, this line of reasoning would fully sustain, for example, regulations requiring newspapers to be licensed before they begin operations. That is precisely the sort of regulation which the framers of the First Amendment fully intended to forbid. The attempted analogy of the Court below between the statute at issue here and the question presented in *Red Lion*, *supra*, thus completely overlooks the fundamental differences, both in technology and in First Amendment principles, which exist between newspapers and the broadcast media.

That such a distinction does exist and is sustained on policy grounds is plain. It was recently reemphasized by this Court in *Columbia Broadcasting System*, *supra*, in the following language:

> "The tensions inherent in such a regulatory structure [of broadcasting] emerge more clearly when we compare a private newspaper with a broadcast licensee. The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers — and hence advertisers — to assure financial success; and, second, the journalistic integrity of its editors and publishers." ____ U.S. at ____, 36 L.Ed.2d at 792.

In *Columbia Broadcasting System*, this Court went on to say that the measure of freedom accorded to broadcasters is "not as large as that exercised by a newspaper." *Id.* If broadcasters cannot constitutionally be compelled to abdicate editorial discretion and accept material for broadcast, it follows, a *fortiori*, that newspapers whose range of discretion is even greater cannot be subjected to regulation which requires them to publish materials against their will.

The *Columbia Broadcasting* case was decided on May 29, 1973, after briefs had been submitted to the Florida Supreme Court in this case, but the decision was promptly called to the attention of that Court. Nevertheless, the Florida Supreme Court did not even mention *Columbia Broadcasting* in its *per curiam* opinion. *Columbia Broadcasting* was mentioned only in the specially concur-

ring opinion filed by Justice Roberts, in which five other members of the Court joined. Justice Roberts correctly reasoned that the *Columbia Broadcasting* case was distinguishable due to the differences between broadcast and other media. However, having distinguished broadcast media from other media, Justice Roberts reached the amazing conclusion that the press can be subjected to even *more* regulation than the broadcast media. Justice Roberts further asserted that the Court's *per curiam* opinion, which rested heavily upon the *Red Lion* case, did not conflict with *Columbia Broadcasting*, because *Red Lion* was adhered to in the later decision. A distinction was further discerned in that *Columbia Broadcasting* rejected a requirement that broadcasters accept paid advertising because, among other things, this would provide access only to the affluent, whereas the Florida statute provides access regardless of ability to pay. Such logic flies directly in the face of the long-established constitutional principle that the only basis for *any* regulation of the content of broadcasting is its unique use of limited airwaves. *E.g.*, *Columbia Broadcasting System, Inc. v. Democratic National Committee, supra*; *Red Lion Broadcasting Co. v. FCC, supra; National Broadcasting Company v. United States*, 319 U.S. 190, 226 (1943).

The difference, therefore, between regulation which may be permissible in the context of radio and television and that which is permitted with respect to the newspapers derives from the basic technology of the two media. As this Court recognized long ago in *National Broadcasting Company v. U.S., supra*, the regulation of broadcasting is virtually unavoidable since all who wish to speak over the airwaves simply cannot be permitted to do so or none will be heard. Whether the necessity of licensing broadcast

stations and the technology limitations of the spectrum are, of themselves, a sufficient ground to justify the Fairness Doctrine is, in light of this Court's evolving views as expressed in *Columbia Broadcasting System*, open to question. In any case, the only grounds upon which the Fairness Doctrine can be sustained is "the unique characteristics of electronic communication." *Capital Broadcasting Co. v. John Mitchell*, 333 F.Supp 582 (D.D.C. 1971), *aff'd* 405 U.S. 1000 (1972).

The direct conflict between the attempt by the Florida Supreme Court to draw an analogy between the broadcast and print media and this Court's views is illustrated by the following excerpts from the Court's opinion in *Columbia Broadcasting System:*

> "[T]he broadcast media pose unique and special problems not present in the traditional free speech case. Unlike other media, broadcasting is subject to an inherent physical limitation. . . . The Court spoke to this reality when, in *Red Lion*, we said 'it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.' *Red Lion, supra*, 395 U.S., at 388." ___ U.S. at ___, 36 L.Ed.2d at 783.
>
> • • •
>
> "Nor can we accept the Court of Appeals view that every potential speaker is 'the best judge' of what the listening public ought to hear or indeed the best judge of the merits of his or her views. All journalistic tradition and experience is

to the contrary. For better or worse, editing is what editors are for; and editing is selection and choice of material." ____ U.S. at ____, 36 L.Ed.2d at 796.

Similar views were expressed in the concurring opinions of Justices Douglas and Stewart:

Justice Douglas:

"It would come as a surprise to the public as well as to publishers and editors of newspapers to be informed that a newly created federal bureau would hereafter provide 'guidelines' for newspapers or promulgate rules that would give a federal agency power to ride herd on the publishing business to make sure that fair comment on all current issues was made.

• • •

"Of course there is private censorship in the newspaper field. But for one publisher who may suppress a fact, there are many who will print it. But if the government is the censor, administrative fiat not freedom of choice carries the day." ____U.S. at ____, 36 L.Ed.2d at 811, 812.

Justice Stewart:

"There is never a paucity of arguments in favor of limiting the freedom of the press. The Court of Appeals concluded that greater government control of press freedom is acceptable here because of the scarcity of frequencies for broad-

casting. But there are many more broadcasting stations than there are daily newspapers.

* * *

"Perhaps I overstate the logic of the opinion of the Court of Appeals. Perhaps its 'balancing' of First Amendment 'values' would require no more than that newspapers be compelled to give 'limited' access to dissident voices, and then only if those voices were 'responsible'. And perhaps it would require that such access be compelled only when there was a single newspaper in a particular community. But it would be a close question for me which of these various alternative results would be more grossly violative of the First Amendment's guarantee of a free press. For that guarantee gives *every* newspaper the liberty to print what it chooses and reject what it chooses, free from the intrusive editorial thumb of Government." ___ U.S. at ___, 36 L.Ed.2d at 807-808.

(Footnotes omitted)

The attempt by the Florida Supreme Court to analogize §104.38, Fla. Stat., with the Fairness Doctrine must, therefore, necessarily fail. The supposed analogy ignores completely the express and repeated statements by this Court that such constitutional merit as the Fairness Doctrine may have rests entirely on the "unique and special problems" presented by the technology of the electronics media which are wholly absent in the instant case. The reliance of the Court below upon *Red Lion* was thus error. If its decision permitted to stand, it will obliterate the

distinctions which this Court has found to exist between the media and will accord to newspapers a lesser measure of journalistic freedom than that accorded to broadcasters.

5. *The effect of the Florida statute will be to reduce, not increase, the flow of expression of political views.*

Section 104.38, Fla. Stat., cannot be permitted to stand because there is no compelling state interest to sustain a regulation which suspends the unfettered exercise of editorial discretion and requires the publication of material against the newspaper's will. The impact upon the vital role of a free press, if this statute is upheld, will be profound.

> "A free press stands as one of the greater interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

The Florida Supreme Court ignored numerous First Amendment cases in which statutes have been struck down which might have a constitutionally impermissible chilling effect on freedom of expression. For example, one of the principal reasons for the doctrine announced in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), was to provide more "elbow room" for free expression on subjects of public interest and concern.

> ". . . would-be critics of official conduct may be deterred from voicing their criticism, even

> though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.' *Speiser v. Randall, supra*, 357 U.S. at 526. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments." *Id.* at 279.

See also, Rosenbloom v. Metromedia, 403 U.S. 29, 52-53 (1971); *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

As the District of Columbia held in *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967):

> "Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is 'hardly less virulent for being privately administered.'"

The intrusion of §104.38, Fla. Stat., reaches to "any matter" published in a newspaper, presumably including not only editorials, which were the basis of Tornillo's complaint in this case, but also news stories, columns, advertising, cartoons, and any other material. The statute, therefore, sweeps far broader than the narrow regulation of

classified advertising cautiously upheld by this Court in *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*, ____ U.S. ____, 37 L.Ed.2d 669 (1973).

If a newspaper cannot print publications concerning political candidates unless it is prepared to publish their "replies" at its expense, the newspaper will be deterred from making the initial publications. Conscientious newspapers will be reluctant to print anything concerning impending elections if in doing so they become obligated to provide free space for "replies" that may be antithetical to the newspapers' views. Such "replies" could be obscene or libelous. The potential expense of printing the "replies" could be substantial due to the large number of candidates and the considerable amount of space that every responsible newspaper in this state devotes to coverage of elections. The deterrent effect of the statute is even more severe because it provides for criminal penalties, even though its interpretation is subject to considerable uncertainty, as discussed below.

B. The Vagueness and Ambiguity of the Florida Statute Significantly Increase Its Unconstitutional Effect Upon Legitimate Expression

Even if some form of reply or access statute might theoretically be compatible with the First Amendment, §104.38, Fla. Stat., is not such a statute. The statute's vagueness and ambiguity result in uncertainty as to its meaning, greatly increasing its inhibitory effect upon the free expression protected by the First Amendment.

It is fundamental that restrictions upon free expression, even if otherwise constitutional, may violate the First Amendment if they are insufficiently precise.

> "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer." *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966). (fn.om.)

The constitutional test of definiteness is particularly strict in the case of a criminal statute such as §104.38, Fla. Stat. *E.g., NAACP v. Button*, 371 U.S. 415, 432-33 (1963); *Winters v. New York*, 333 U.S. 507, 515 (1948).

The principal ambiguities in the statute include the following:

(i) What is a "newspaper"? Does the term include any publication, such as magazines, newsletters, pamphlets, brochures and handbills? Does it include "newspapers" published in other states but circulated in Florida?

(ii) Does the term "columns" in the statute include editorials, signed columns, news articles and letters to the editor? Does the term include advertisements? Cartoons? Does the term include replies published pursuant to §104.38, Fla. Stat.?

(iii) What is an "assault" on personal character, or an "attack" on an official record? Do they merely en-

compass criticism, no matter how truthful or valid? Does personal character include any individual human quality?

(iv) Need a "candidate" be mentioned specifically by name to be entitled to a reply, or does a reply right arise if a "candidate" can be identified in a publication, even though not named? If a publication refers to a group, does each member of the group have a right to reply?

(v) What is an equally "conspicuous" place for publication of a reply? Is page four of a newspaper as conspicuous as page five?

(vi) How lengthy a reply may be made? If a newspaper editorial states only, "John Doe is not fit for office," what is the length of the permitted reply? Seven words? Can a statute providing such a "reply" be seriously considered as enhancing public discussion?

Although both lower Florida courts which passed upon the statute held it void for vagueness, the Florida Supreme Court sought to circumvent this obstacle in two ways. First, the Court sought to resolve certain ambiguities in the statute by interpretation, holding that a newspaper need not publish a reply unless it was:

> "wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slanderous of the publication nor anyone else, nor vulgar nor profane." (App. 16)

Such an interpretive approach which seeks to remedy massive gaps in the statute cannot cure constitutional infirmities. Criminal statutes affecting freedom of expression must delineate precise standards of conduct without resort to wholesale judicial construction. *Winters v. New York, supra* at 515 (1948); *Ashton v. Kentucky, supra; NAACP v. Button, supra.* Moreover, despite the Florida Supreme Court's efforts, major ambiguities and uncertainties remain. The unconstitutional effect of the statute cannot be diminished by the Court's intentions, expressed in its *per curiam* decision denying the Petition for Rehearing, to refine and define the statute's terms in future cases. *E.g.,Giaccio v. Pennsylvania,* 382 U.S. 399 (1966).

The second aspect of the Florida Supreme Court's curative effort was its holding that because the plaintiff was seeking only civil remedies, the Court need not pass upon whether the statute measured up to standards required of criminal statutes. The Court reasoned that even if the statute was impermissibly vague so that it could not be the basis of a criminal prosecution, the statute was sufficient for an implied civil right of action. The Court thus held, in effect, that an unconstitutionally vague criminal statute may be invoked for a civil remedy. Such logic is without precedent.

CONCLUSION

In upholding the constitutionality of §104.38, Florida Statutes, the Supreme Court of Florida ignored fundamental First Amendment principles. The questions presented by this appeal are substantial, with major implications for the public interest in freedom of speech and of the press.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF FLORIDA

CASE NO. 43,009

PAT L. TORNILLO, JR.,

Appellant,

vs.

THE MIAMI HERALD PUBLISHING COMPANY,
a Division of Knight Newspapers, Inc.,

Appellee.

July 18, 1973

PER CURIAM

This cause is before us upon direct appeal from Circuit Court of Dade County, holding Florida Statute 104.38[1] unconstitutional thereby vesting jurisdiction in this Court under Article V, Section 3(b)(1), Florida Constitution, as amended 1973.

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[1]F.S. §104.38 — Newspaper assailing candidate in an election; space for reply — If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083.

Appellant Tornillo, plaintiff below, who was a candidate for the State Legislature demanded that appellee print verbatim his replies to two editorials printed therein attacking appellant's personal character. The appellee refused and Tornillo filed complaint for declaratory and injunctive relief and punitive damages. Pursuant to Florida Statute 86.091, the Attorney General of this State was advised that appellant intended to contest the constitutionality vel non of Florida Statute 104.38. In view of the circumstances, the trial court granted the request for an emergency hearing.

Preliminarily, the trial court determined that the statutory provision in question is a criminal statute and that absent special circumstances, equity will not ordinarily enjoin commission of a crime. Pompano Horse Club Co. v. State, 93 Fla. 415, 111 So. 801 (1927). Notwithstanding this infirmity in appellant's complaint, the trial court further concluded that F.S. §104.38 is violative of Article I, Sections 4 and 9 of the Constitution of Florida and the Fourteenth Amendment to the Constitution of the United States as a restraint upon freedom of speech and press and because it is impermissibly vague and indefinite.

Believing that the promulgation of this statute is authorized by Article IV, Section 4,[2] and the First[3] and Fourteenth Amendments to the Constitution of the United

[2]Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against invasion; and On Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

[3]Amendment I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; . . .

States, and Article VI, Section 1,[4] and Article I, Section 4[5] of the Florida Constitution, and believing that this statute enhances rather than abridges freedom of speech and press protected by the First Amendment, we hold that it does not constitute a violation of the First and Fourteenth Amendments to the Constitution of the United States or Article I, Section 4, Florida Constitution.

The election of leaders of our government by a majority of the qualified electors is the fundamental precept upon which our system of government is based, and is an integral part of our nation's history. Recognizing that there is a right to publish without prior governmental restraint,[6] we also emphasize that there is a correlative responsibility that the public be fully informed.

The entire concept of freedom of expression as seen by our founding fathers rests upon the necessity for a fully informed electorate. James Madison wrote that, "A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy; or, perhaps both. Knowledge will forever govern ignorance;

[4]Section 1. Regulation of elections. — All elections by the people shall be by direct and secret vote. General elections shall be determined by a plurality of votes cast. Registration and elections shall, and political party functions may, be regulated by law.

[5]Section 4. Freedom of speech and press. — Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.

[6]Near v. Minnesota, 283 U.S. 697, New York Times v. United States, 430 U.S. 713, Martin v. City of Struthers, 319 U.S. 141, Lamonet v. Postmaster General, 381 U.S. 301.

and a people who mean to be their own governors, must arm themselves with the power which knowledge gives (to W. T. Barry, August 4, 1822)."[7]

The public "*need to know*" is most critical during an election campaign. By enactment of the first comprehensive corrupt practices act relating to primary elections in 1909 our legislature responded to the need for insuring free and fair elections. Article III, Section 26, and Article VI, Section 9, Constitution of Florida 1885, commanded the Legislature to pass laws "regulating elections and prohibiting under adequate penalties, all undue influence thereof from power, bribery, tumult or other improper practices" and to "enact such laws as will preserve the purity of the ballot given under this Constitution." This act of 1909 did not deal with the subject of the wrongful use of newspapers or other printed or written matter, with the exception of a provision which declared it to be a misdemeanor for any candidate or other person to have or distribute on day of primary at or near any polling place any writing against any candidate in the primary. Florida Statute 104.38 was originally enacted in 1913 as Chapter 6470, Section 12, Laws of Florida, 1913.[8] This second act adopted

[7]6 Writings of James Madison 398 (Hunt Ed. 1906), The Complete Madison 337 (1953).

[8]Chapter 6470, Section 12 (Laws of Florida, 1913), provided, "That if any newspaper in its columns assails the personal character of any candidate for nomination in a primary election, or charges such candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall, upon request of such candidate, immediately publish free of cost any reply he may make thereto, in as conspicuous a place and in the same kind of type as the matter that calls for such reply; provided, such reply does not take up more space than the matter replied to. A person who fails to comply with the provisions of this Section, shall upon conviction be punished by fine not exceeding five hundred dollars, or by imprisonment." See subsequent history of stat-

in 1913 known as the corrupt practices act was enacted to supplement the act of 1909. The statutory provision, the constitutionality vel non which is being questioned in the instant cause, was enacted not to punish, coerce or censor the press but rather as a part of a centuries old legislative task of *maintaining conditions conducive to free and fair elections.* The Legislature in 1913 decided that owners of the printing press had already achieved such political clout that when they engaged in character assailings, the victim's electoral chances were unduly and improperly diminished. To assure fairness in campaigns, the assailed candidate had to be provided with an equivalent opportunity to respond; otherwise not only the candidate would be hurt *but also* the people would be deprived of both sides of the controversy.[9]

What some segments of the press seem to lose sight of is that the First Amendment guarantee is "not for the

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ute, Section 5927, Revised General Statutes of Florida, 1920, entitled newspaper assailing candidate must give free space for reply. This provision was re-enacted as Section 875.40, Florida Statutes, which varies only slightly from the present law. Section 875.40, Florida Statutes was identical to Chapter 6470, Section 12 (Laws of Florida, 1913). In 1951, the Legislature renumbered and slightly revised this provision to cover any elections (not just primaries) and to provide that, "Any one failing to comply with the provisions of the section shall, upon conviction, be guilty of a misdemeanor." Chapter 268.70, Laws of Florida, 1951. Section 104.38 was entitled, "Newspaper assailing candidate in election; space for reply." See also Chapter 28151, General Laws, 1953, which adds the words "or for election" so that the preliminary portion of the statute reads: "If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election . . . " In 1972, HB 2801 attempting to repeal F.S. 104.38 died in committee.

[9]Ex Parte Hawthorne, 116 Fla. 608, 156 So. 619 (1934). 9 Florida L.J. 297 (1935), "Brief History of the Corrupt Practices Act of Florida," J. V. Keen.

benefit of the press so much as for the benefit of us all."[10] Speech concerning public affairs is more than self expression. It is the essence of self government.[11]

Mr. Justice Learned Hand expressed the role of the press well when he emphasized,

> "However neither exclusively, nor even primarily are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: The dissemination of news from as many different sources and with as many different facets and colors as possible."[12]

In Pennekamp v. Florida, 328 U.S. 331 (1946), the Supreme Court of the United States emphasized that the power of the press must be tempered with responsibility when it explained,

> "Without a free press there can be no free society. Freedom of the press, however, is not an end in itself but a means to the end of a free society. The scope and nature of the constitutional protection of freedom of speech must be viewed in that light and in that light applied. . . .
> "A free press is vital to a democratic society because its freedom gives it power. Power in a democracy implies responsibility in its exercise.

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[10]Time, Inc. v. Hill, 385 U.S. 374, 389.

[11]Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

[12]United States v. Associated Press, 52 F.Supp. 362, 372.

No institution in a democracy, either governmental or private, can have absolute power. Nor can the limits of power which enforce responsibility be finally determined by the limited power itself. . . . In plain English, freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise. Most State constitutions expressly provide for liability for abuse of the press's freedom. That there was such legal liability was so taken for granted by the framers of the First Amendment that it was not spelled out. Responsibility for its abuse was embedded in the law. The First Amendment safeguarded that right.

"The press does have the right, which is its professional function, to criticize and to advocate. The whole gamut of public affairs is the domain for fearless and critical comment, and not the least the administration of justice. But the public function which belongs to the press makes it an obligation of honor to exercise this function only with the fullest sense of responsibility. Without such a lively sense of responsibility a free press may readily become a powerful instrument of injustice." [Emphasis Supplied]

The concept which appears throughout the decisions underlying First Amendment guarantees that there is a broad societal interest in the free flow of information to the public by the Supreme Court of the United States was explicitly stated in *New York Times v. Sullivan*, 376 U.S. 254 (1964), as well as other Supreme Court decisions, as follows:

> "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Roth vs. United States, 354 U.S. 476, 484, 1 L.Ed.2d 1498, 1506, 77 S.Ct. 1304. The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the republic, is a fundamental principle of the constitutional system."

The statute here under consideration is designed to add to the flow of information and ideas and does not constitute an incursion upon First Amendment rights or a prior restraint, since no *specified newspaper content is excluded.* There is nothing prohibited but rather it requires, in the interest of full and fair discussion, additional information.

The right of the public to know all sides of a controversy and from such information to be able to make an enlightened choice is being jeopardized by the growing concentration of the ownership of the mass media into fewer and fewer hands, resulting ultimately in a form of private censorship. Through consolidation, syndication, acquisition of radio and television stations and the demise of vast numbers of newspapers, competition is rapidly vanishing and news corporations are acquiring monopolistic influence over huge areas of the country. We take note of a recent

article in Florida Trend magazine, March 1973, explicating that the Miami Herald is the largest newspaper published in Florida, that it is larger in size than the next two largest newspapers; and that it is not only a large city daily newspaper but also is a regional and international newspaper.

Freedom of expression was retained by the people through the First Amendment *for all the people* and *not merely for a select few.* The First Amendment *did not create a privileged class* which through a monopoly of instruments of the newspaper industry would be able to *deny to the people the freedom of expression* which the First Amendment guarantees. The Supreme Court of the United States in *Associated Press v. United States*, 326 U.S. 1, 20, clearly expounded,

> "It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.

> Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity."

More recently in *Red Lion Broadcasting Co. v. F.C.C.*, 381 F.2d 908, affirmed 395 U.S. 367 (1969), the Supreme Court opined,

> "Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public. Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. 'Freedom of the press from governmental interference under the First Amendment does not

> sanction repression of that freedom by private interests.' *Associated Press v. United States*, 326 U.S. 1, 20 (1945)."

By this tendency toward monopolization, the voice of the press tends to become exclusive in its observation and its wisdom which in turn deprives the public of their right to know both sides of controversial matters.

Appellant urges that if a newspaper may attack a candidate with impunity and he is provided no right to reply, the public interest in free expression suffers, because they can only hear the publisher's side of the controversy and are denied the dissenting view.

Although we have carefully considered appellee's argument that *Red Lion Broadcasting Co. v. F.C.C.*, supra, is inapplicable to the present cause, we cannot discount certain excerpts therefrom which are applicable to First Amendment guarantees in general. Therein, the Supreme Court explained that,

> "Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication." 395 U.S. at 401, n. 28.

That Court further stated in *Red Lion Broadcasting v. F.C.C.*, supra, at 390, in *Associated Press v. U.S.*, supra, at 20, and *New York Times v. Sullivan*, supra, at 270, that it is the purpose of the First Amendment to preserve

an uninhibited marketplace of ideas wherein truth will prevail rather than to countenance a monopolization of that market whether by government or private enterprise.

Florida's right of reply statute is consistent with the First Amendment as applied to this State through the Fourteenth Amendment. In *Rosenbloom v. Metromedia*, 403 U.S. 29, 47, we find that the Supreme Court of the United States is inclined to this position by the following quote from the majority opinion:

> "Furthermore, in First Amendment terms, the cure seems far worse than the disease. If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern."

To this comment, the Court appended the following note:

> "Some States have adopted retraction statutes or right-of-reply statutes. See Donnelly, The Right of Reply: An Alternative to an Action for Libel, 34 Va. L.Rev. 867 (1948); Note, Vindication of the Reputation of a Public Official, 80 Harv. L.Rev. 1730 (1967). Cf. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).
>
> "One writer, in arguing that the First Amendment itself should be read to guarantee a right of access to the media not limited to a right to respond to defamatory falsehoods, has suggested several ways the law might encourage public dis-

> cussion. Barron, Access to the Press — A New First Amendment Right, 80 Har. L. Rev. 1641, 1666-1678 (1967). It is important to recognize that the private individual often desires press exposure either for himself, his ideas, or his causes. Constitutional adjudication must take into account the individual's interest in access to the press as well as the individual's interest in preserving his reputation, even though libel actions by their nature encourage a narrow view of the individual's interest since they focus only on situations where the individual has been harmed by undesired press attention. A constitutional rule that deters the press from covering the ideas or activities of the private individual thus conceives the individual's interest too narrowly."

Although appellee attempts to minimize the import of the aforestated quotation, we feel compelled to note that such remarks regarding right to reply legislation are entirely consistent with past precedent establishing the fundamental purpose of the First Amendment to inform the people.

Neither appellant nor appellee takes issue with the holding of the trial court that it lacked jurisdiction to enjoin an alleged violation of Florida Statute 104.38. This provision is criminal in nature and absent special circumstances equity will usually not enjoin commission of a crime.[11]

Appellant urges that the Right of Reply Statute in question is neither impermissibly vague nor unnecessarily

[11]Pompano Horse Club Co. v. State, supra, 17 Fla. Jur. Injunctions, §46.

broad. We must agree and therefore uphold the constitutionality of this statutory provision. It is a fundamental principle that this Court has the duty, if reasonably possible, consistent with protection of constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality and if reasonably possible a statute should be construed so as not to conflict with the constitution.[14] Courts are inclined to adopt that reasonable interpretation of a statute which removes it farthest from constitutional infirmity. In *Gitlow v. People of New York*, 268 U.S. 652, the Supreme Court of the United States stated every presumption is to be indulged in favor of the validity of a statute, and the case is to be considered in the light of the principle that the State is primarily the judge of regulations in the interest of public safety and welfare.

We do not believe that Florida's statutory right of reply is lacking in any of the required standards of preciseness. The statute is sufficiently explicit to inform those who are subject to it as to what conduct on their part will render them liable to its penalties.

We recognize that certainty is all the more essential when vagueness might induce individuals to forego their rights of speech, press and association for fear of violating an unclear law. *Scull v. Virginia*, 359 U.S. 344 (1959), *Ashton v. Kentucky*, 384 U.S. 195 (1965).

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[14]Buck v. Gibbs, 34 F. Supp. 510, Mod. 313 U.S. 387 (1940); Hunter v. Owens, 80 Fla. 812, 86 So. 839 (1920); Cragin v. Ocean 4 Lake Realty Co., 133 So. 569, 135 So. 795 (1931), appeal dism. 286 U.S. 523; Haworth v. Chapman, 113 Fla. 591, 152 So. 663 (1933); Hanson v. State, 56 So.2d 129 (1952); Overstreet v. Blum, 227 So.2d 197 (Fla. 1969); Hancock v. Sapp, 225 So.2d 411 (Fla. 1969); Rich v. Ryals, 212 So.2d 641 (Fla. 1968).

In *Brock v. Hardie*, 154 So. 690, 694 (1934), relative to the issue of vagueness, this Court said,

> "Whether the words of the Florida statute are sufficiently explicit to inform those who are subject to its provisions what conduct on their part will render them liable to its penalties is the test by which the statute must stand or fall, because, as was stated in the opinion above mentioned, 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'
>
> "Such seems to be the test approved by the Supreme Court of the United States. Citation of authorities as to what may be considered the exact meaning of the phrase 'so vague that men of common intelligence must necessarily guess at its meaning,' so that certain conduct may be considered within or outside the true meaning of that phrase, or what language of a statute may lie within or without it, would be of little aid to us.
>
> "We must apply our own knowledge with which observation and experience have supplied us in determining whether words employed by the statute are reasonably clear or nor (sic) in indicating the legislative purpose, so that a person who may be liable to the penalties of the act may know that he is within its provisions or not."

Inter alia, appellee attacks the constitutionality of the statute on grounds of vagueness and overbreadth because of the use of the term "any"—referring to the type of reply allowable. This statute provides in part,

> "if any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply . . . ." [Emphasis Supplied]

Because of the longstanding policy of this Court to give a statute, if reasonably possible, a construction supporting its constitutionality, we hold that the mandate of the statute refers to "any reply" which is wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slanderous of the publication nor anyone else, nor vulgar nor profane.

We conclude that the statute in question is as certain and definite as others heretofore upheld as constitutionally permissible. The following statement made by Judge Tamm in *Red Lion Broadcasting Co. v. F. C. C.*, supra, 381 F.2d at 921, is clearly applicable to the instant cause: "Here there is no broad-reaching, all-embracive statutory provision penalizing knowing as well as unknowing conduct."

Although apparently not raised before the trial court, the brief of Amicus Times Publishing Co. has raised the issue that Florida Statute 104.38 is a deprivation of property right without due process. With this contention, we can not agree. Florida Statute 104.38 is a valid exercise of the state police power enacted to assure the integrity of the electoral process. In *Miller v. Schoene*, 276 U.S. 272 (1928), the Supreme Court stated,

> "And where the public interest is involved preferment of that interest over the property interest of the individual, to extent even of its destruction, is one of the distinguishing characteristics of every exercise of police power which affects property." Id. at 279, 280.

We find this argument of deprivation of property rights by being required to furnish free space to be without merit. See *Miller v. Schoene*, supra; *Marsh v. Alabama*, 326 U.S. 501, at 506; *Red Lion Broadcasting v. F. C. C.*, supra; *Rosenbloom v. Metromedia*, supra; *Chronicle Publishing Co. v. Attorney General*, 94 N.H. 148, 48 A.2d 478 (1946); *Amalgamated Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

In conclusion, we do not find that the operation of the statute would interfere with freedom of the press as guaranteed by the Florida Constitution and the Constitution of the United States. Indeed it strengthens the concept in that it presents both views leaving the reader the freedom to reach his own conclusion. This decision will encourage rather than impede the wide open and robust dissemination of ideas and counterthought which the concept of free press both fosters and protects and which is essential to intelligent self government.

Newspapers are not wholly dependent on electronic media as were the broadcasters in *Red Lion Broadcasting Co. v. F. C. C.*, supra. However, we have no difficulty in taking judicial notice that the publishers of newspapers in this contemporary era would perish without this vital source of communications. The dissemination of news other than purely local is transmitted over telegraph wires or over air waves. This not only includes dissemination of news but also in chain newspaper operations so prevalent today, the Miami Herald being one; even editorials are prepared in one place and transmitted electronically to another. Therefore, the principles of law enunciated in *Red Lion Broadcasting Co. v. F. C. C.*, supra, have been taken into consideration in reaching our opinion.

A half free press would be deceptive to the public. Florida Statute 104.38, in the interest of all the people, provides that candidates for public office under certain prescribed circumstances shall have a right of reply, a right of expression. It does not deny to the owner of the instruments of the newspaper industry any right of expression. The statute *assures*, and *does not abridge*, the right of expression which the First Amendment guarantees. The statute supports the freedom of the press in its true meaning—that is, the right of the reader to the whole story, rather than half of it—and without which the reader would be "blacked out" as to the other side of the controversy.

For the foregoing reasons, we find Florida Statute 104.38 to be constitutional and reverse the holding of the trial court that it is unconstitutional.

Accordingly, the judgment of the trial court is reversed and this cause is remanded to the trial court for further proceedings not inconsistent herewith.

It is so ordered.

CARLTON, C.J., ADKINS, McCAIN and DEKLE, JJ., and RAWLS, District Court Judge, Concur
ROBERTS, J., Concurs Specially with Opinion
BOYD, J., Dissents with Opinion
ROBERTS, J., Specially Concurring:

I concur in the opinion and judgment of the majority. We are fully cognizant of the recent decision rendered by the Supreme Court of the United States in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, ——U.S.——, 41 U.S.L.W. 4688, decided May 29, 1973, which holds that neither the Federal Communications Act nor the First Amendment require broadcasters to accept paid editorial advertisements. But this opinion in no way derogated the earlier opinion of that court in *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969), validating the fairness doctrine of the Federal Communications Commission which imposes two affirmative responsibilities on the broadcaster—coverage of issues must be adequate and must fairly reflect differing viewpoints. As the Supreme Court stated in *Columbia Broadcasting*, supra, "In fulfilling its Fairness Doctrine obligations, the broadcaster must provide free time for the presentation of opposing views if a paid sponsor is unavailable, . . . and must initiate programming on public issues if no one else seeks to do so. See John J. Dempsey, 6 P & F Radio Reg. 615 (1950); Red Lion, supra, 395 U.S., at 378."

The complaints filed in *Columbia Broadcasting*, supra, by the Democratic National Committee and the Business Executives Move for Vietnam Peace, alleged that a broadcaster had violated the First Amendment by refusing to sell it time to broadcast spot announcements expressing political views of the different groups. The Supreme Court turned its decision primarily on the limited nature of the broadcasting airwaves and the existence of the Fairness Doctrine which requires broadcasters to provide free time for presentation of opposing political views when a paid sponsor is not available. The decision in Columbia Broadcasting is directed solely to the peculiar and limited nature of broadcasting frequencies, and that decision is not applicable to the instant facts presently before this Court in the case sub judice. Chief Justice Burger commences the body of his opinion with the following remarks:

> "Mr. Justice White's opinion for the Court in Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969), makes clear that the broadcast media pose unique and special problems not present in the traditional free speech case. Unlike other media, broadcasting is subject to an inherent physical limitation. Broadcast frequencies are a scarce resource; they must be portioned out among applicants. All who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated. The Court spoke to this reality when, in Red Lion, we said 'it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.' Red Lion, supra, 395 U.S., at 388.

"Because the broadcast media utilize a valuable and limited public resource, there is also present an unusual order of First Amendment values. Red Lion discussed at length the application of the First Amendment to the broadcast media. In analyzing the broadcasters' claim that the Fairness Doctrine and two of its component rules violated their freedom of expression, we held that '[n]o one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because 'the public interest' requires it 'is not a denial of free speech." Red Lion, supra, 395 U.S., at 389. Although the broadcaster is not without protection under the First Amendment, United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948), '[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.' Red Lion, supra, 395 U.S., at 390."

After recounting the history of broadcast regulations, the court in *Columbia Broadcasting*, supra, opined that broadcasters are charged with the duty of providing the listening and viewing public with access to a balanced presentation of information on issues of public importance. The Supreme Court was particularly concerned with forcing broadcasters to accept paid political advertisements when broadcasting frequencies are so limited because of a substantial risk that such a system would be monopolized by

those who could and would pay the costs, and that a system so heavily weighted in favor of the financially affluent or those with access to wealth would in effect undermine the effective operation of the Fairness Doctrine. The views of the affluent would prevail since they would have it within their power to purchase time more frequently, and editorial advertising could then be monopolized by those of one political persuasion. Those were the concerns of the Supreme Court in *Columbia Broadcasting*, supra, when it rendered its decision that broadcasters are not required to accept paid editorial advertisements regardless of the content thereof.

Our opinion in the instant cause in no way conflicts with the recent decision of the Supreme Court in *Columbia Broadcasting*, supra.

CARLTON, C.J., ADKINS, McCAIN and DEKLE, JJ., and RAWLS, District Court Judge, Concur

BOYD, J., Dissenting:

I respectfully dissent.

This statute carries a penalty provision for violations thereof, and it therefore must be most strictly construed in favor of any person accused thereunder. The statute is so vague on its face as to raise doubts in the minds of those reading it as to the exact underlying legislative intent.

There are no standards as to when a publisher must carry a reply. For example, the following are just some of the important questions left unanswered by this statute.

Does the law include both news stories and editorial comment? If a story mentions a "situation", but does not mention the candidate by name, may he reply? When the publisher knows his statements are true, must he publish a statement from the candidate which he knows to be false? If the reply of the candidate libels other persons, must the publisher print it, and, if so, is the publisher subject to liability for any resulting libel suit? If the candidate's reply were to contain obscene language, would the publisher still have to print it—and thereby invite prosecution under our obscenity laws?

The First Amendment to the Constitution of the United States provides that, "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." Article I, Section 4 of the Constitution of the State of Florida similarly provides: "No law shall be passed to restrain or abridge the liberty of speech or of the press." Since these constitutional provisions prohibit the government from limiting the right of the publishing press to publish news and comment editorially, it would be equally unconstitutional for the government to compel a publisher to print a statement of any other person, or persons, against that publisher's will.

The majority opinion correctly observes that freedom of speech and freedom of the press carry the duty to speak the truth. And, of course, the constitutional rights of freedom of speech and freedom of the press must be exercised with appropriate regard to the provisions of our libel and obscenity statutes. As in all other areas of public and private service, some errors will, from time to time, surely occur. Yet, recognizing that the survival of a free press is contingent upon the press fulfilling its duty to the gen-

eral public, the overwhelming majority of those in the publishing press comply with the highest of ethical standards.

We are taught in the Bible that, "the truth will make you free".[1]

Free people can make proper decisions for their own self-government only when they are adequately informed by a free press. To the extent that government limits or adds to that which a publisher must distribute, freedom of speech and freedom of the press are thereby diminished.

Almost everyone whose name has been carried frequently in the news media has been offended, at one time or another, by stories or comments with which he disagrees. This is part of the price one pays for success and notoriety. If there exists a problem in this state of affairs, the muzzling of a free press is not the solution to such problem.

I therefore dissent.

[1]John 8:32

APPENDIX B

IN THE SUPREME COURT OF FLORIDA

CASE NO. 43,009

PAT L. TORNILLO, JR.,

Appellant,

vs.

THE MIAMI HERALD PUBLISHING COMPANY,
a Division of Knight Newspapers, Inc.,

Appellee.

October 10, 1973

ON PETITION FOR REHEARING

PER CURIAM

Appellee, Miami Herald, by petition for rehearing strenuously argues that this Court's opinion overlooks the fact that §104.38, Florida Statutes, is a criminal statute and that this Court is without power to rewrite or perform plastic surgery on a criminal statute in an attempt to cure the statute's vagueness by writing a definition of "reply". Appellee then journeys upon numerous hypothetical inquiries—What is a newspaper? What is an assault? What is an equally "conspicuous place"?—and then reasons that these "obvious ambiguities" render the subject statute so vague that same must be held unconstitutional.

As was emphatically stated in the opinion of this Court, the action underlying this cause before us is a civil action which was filed in the Circuit Court for the Eleventh Judicial Circuit seeking to require appellee to publish appellant's reply pursuant to Florida Statute 104.38 and for damages. No criminal penalty is sought in the case sub judice, and, therefore, the validity vel non of the criminal penalty is not here involved. We are not unmindful of the line of decisions from this Court and the Supreme Court of the United States requiring more specificity in statutory authorship to support a statute which imposes a criminal penalty. However, the language of our opinion clearly defines what would constitute a wrongdoing. We take this opportunity to restate the following excerpt from our opinion:

> "It is a fundamental principle that this Court has the duty, if reasonably possible, consistent with protection of constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality and if reasonably possible a statute should be construed so as not to conflict with the constitution.[1] Courts are inclined to adopt that reasonable interpretation of a statute which removes it farthest from constitutional infirmity. In *Gitlow v. People of New York*, 268 U.S. 652, the Supreme Court of the United States stated every presumption is to be

[1]Buck v. Gibbs, 34 F.Supp. 510, Mod. 313 U.S. 387 (1940); Hunter v. Owens, 80 Fla. 812, 86 So. 839 (1920); Cragin v. Ocean & Lake Realty Co., 133 So. 569, 135 So. 795 (1931), appeal dism. 286 U.S. 523; Haworth v. Chapmen, 113 Fla. 591, 152 So. 663 (1933); Hanson v. State, 56 So.2d 129 (1952); Overstreet v. Blum, 227 So.2d 197 (Fla. 1969); Hancock v. Sapp, 225 So.2d 411 (Fla. 1969); Rich v. Ryals, 212 So.2d 641 (Fla. 1968).

> indulged in favor of the validity of a statute, and the case is to be considered in the light of the principle that the State is primarily the judge of regulations in the interest of public safety and welfare."

Even had this Court found the statute, the constitutionality vel non which is being questioned sub judice, not to be sufficiently definite and specific to support a criminal penalty, this criminal penalty provision would not be fatal to the statute because the statute is so constructed that the criminal penalty can be easily severed and deleted and still leave a complete legislative expression establishing a civil right to damages. This Court has long held that where certain clauses, provisions, or sections of a statutory enactment are in violation of constitutional mandates, it does not necessarily follow that the whole enactment should fail, and this Court has held that the Court may sever the unconstitutional provision and uphold the remainder if that which is left is complete in itself, sensible, and capable of being executed, whether or not the enactment contains a severability clause. *State ex rel. Boyd v. Deal*, 24 Fla. 293, 4 So. 899 (1888), *Gwynn v. Hardee*, 92 Fla. 543, 110 So. 343 (1926); *Louis K. Liggett Co. v. Lee*, 149 So. 8 (Fla. 1933); *City of Daytona Beach v. Harvey*, 48 So.2d 924 (Fla. 1950); *Youngblood v. Darby*, 58 So.2d 315 (Fla. 1952); *Harris v. Bryan*, 89 So.2d 601 (Fla. 1956); *Cramp v. The Board of Public Instruction of Orange County*, 137 So.2d 828 (Fla. 1962); *Davis v. State*, 146 So.2d 892 (Fla. 1962); *Musleh v. Marion County*, 200 So.2d 168 (Fla. 1967); *Small v. Sun Oil Company*, 222 So.2d 196 (Fla. 1969). In *State v. Newell*, 85 So.2d 124 (Fla. 1956), this Court opined:

"We have held that it is not always necessary to declare an entire Act invalid where a portion thereof is unconstitutional simply because the Act does not contain a severability clause. State v. Calhoun County, 126 Fla. 376, 170 So. 883, 886, and cases therein cited. The test is whether this court can say that the Legislature would not have enacted the law under scrutiny except for the provision which is herein held unconstitutional and invalid."

A comparable statute to Florida Statute 104.38 requiring a full and fair correction, apology, and retraction to be published in the same editions or corresponding issues of the periodical in which said article appeared, and in as conspicuous place and type as was said original article,[2] as an abatement of the publisher's liability for punitive damages, was held constitutional by this Court in *Ross v. Gore*, 48 So.2d 412 (Fla. 1950). Courts have generally regarded this type of statute to be in aid of a free press. We take judicial notice that this statute has been frequently used to avoid punitive damages apparently with no adverse effect to newspaper publishers. But, indeed, this statute has been utilized to their financial advantage.

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[2]Florida Statute 770.02 provides:

"If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case shall recover only actual damages."

We also here note another retraction statute promulgated by the Florida Legislature which defines a procedure for abatement of criminal penalty. Florida Statute 836.08 provides:

> "Correction, apology, or retraction by newspaper. —If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then any criminal proceeding charging libel based on an article so retracted, shall be discontinued and barred."

Reverting to the hypothetical inquiries posed by appellee, it is observed that similar questions might well be posed as to the vagueness of certain provisions of Florida Statute 770.02, viz: "good faith"; "falsity"; "a full and fair correction"; "apology"; "conspicuous place"; and Florida Statute 836.08, viz: "correction"; "apology"; "reasonable grounds"; or "a full and fair correction". In short, the definition and meaning of specific words or phrases in a particular factual situation have been and will be an infinite subject of inquiry so long as Homo sapiens engage in the art of communication. At this stage of the instant controversy, we are confronted not with the wisdom of the Legislature in enacting the challenged statutory provision;

our task is to preserve the prerogative of the legislative body unless it clearly contravenes the basic federal and state charters adopted by our citizenry.

In conclusion, it must be remembered that First Amendment Freedom of the Press is for the benefit of *all* the people and not just those who have invested money in the publishing business.

The petition for rehearing is denied.

CARLTON, C.J., ROBERTS, ADKINS, McCAIN and DEKLE, JJ., and RAWLS, District Court Judge, Concur
BOYD, J., Dissents

APPENDIX C

TORNILLO v. MIAMI HERALD PUBLISHING CO.

No. 72-20199.

Circuit Court, Dade County.
October 20, 1972.
38 Fla. Supp 80

FRANCIS J. CHRISTIE, Circuit Judge.

Final judgment: Plaintiff, a candidate for the state legislature, demanded that the Miami Herald print verbatim his replies to two editorials in the Herald relating to his candidacy for public office. The Herald refused.

Plaintiff then brought this action for a mandatory injunction and for damages seeking to enforce §104.38, Florida Statutes, by a civil action. The editorials and plaintiff's replies are attached to the complaint. In view of the nature of the relief requested the court granted plaintiff's request for an emergency hearing on October 2, 1972.

Pursuant to §86.091, Florida Statutes, the attorney general was advised that the defendant intended to ask the court for a declaration that §104.38 was unconstitutional. The attorney general was served with a copy of the complaint and was represented at the hearing.

§104.38 is a criminal statute. Absent special circumstances equity will not enjoin the commission of a crime. Pompano Horse Club Co. v. State (1927), 93 Fla. 415, 111 So. 801, 52 A.L.R. 51; 17 Florida Jurisprudence, *Injunctions*, §46.

However, there is a more serious infirmity in plaintiff's case. The court is of the opinion that §104.38 violates Article I, §§4 and 9 of the Florida Constitution and the Fourteenth Amendment to the U. S. Constitution.

This question was considered in State v. News-Journal Corporation, 36 Fla. Supp. 164, a case filed in the county judge's court of Volusia County, Florida. In a carefully reasoned opinion dated February 14, 1972, Judge J. Robert Durden held §104.38 unconstitutional on two grounds—an infringement upon freedom of the press, and a denial of due process of law because the statute is too vague, indefinite and uncertain to constitute notice of what language may fall within its purview and what constitutes a reply which must be printed. The attorney general advised the court that he had elected not to appeal Judge Durden's decision on the ground that he also had the same reservations about the constitutionality of the statute.

This court concurs in Judge Durden's opinion. State statutes prohibiting or directing any type of publication, particularly upon pain of criminal sanction, are presumed unconstitutional unless it can be demonstrated that the infringement can be justified as required to protect a substantial public interest threatened by a clear and present danger. Near v. Minnesota, 283 U.S. 697 (1931); Thomas v. Collins, 323 U.S. 516, 530 (1945); Palko v. Connecticut, 302 U.S. 319, 327 (1937). The "priority" given First Amendment freedoms "gives these liberties a sanctity and a sanction not permitting dubious intrusions." Thomas v. Collins, supra at page 530. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963). The First

Amendment prohibits the government from restraining the publication even of top secret documents alleged to be vital to the national security. New York Times Co. v. United States, 403 U.S. 713 (1971).

Clearly if the state may not prohibit what a newspaper may print it cannot assume the editorial function and direct a newspaper what to print. By the First Amendment, "The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government." New York Times Co. v. United States, supra at page 717 (Justice Black concurring) (1971).

Since §104.38, Florida Statutes, so clearly reaches cases in which its restraint upon freedom of speech and press does not measure up to any permissible First Amendment standard the statute is void on its face.

Because of its broad intrusion into the area protected by the First Amendment, §104.38 also suffers from an additional infirmity—it is impermissibly vague and indefinite and this vagueness serves to restrict and stifle protected expression. No editor could know from the statute exactly what words would offend the statute or the scope of the reply intended to be mandated. A state may not enact such a broad statute and leave it to the courts, on a case by case basis, to determine the constitutionality of its application to various circumstances. To do so places a citizen in an untenable position of foregoing his protected liber-

ties, or risking criminal prosecution. This dilemma itself impermissibly restricts free expression. Smith v. Cahoon, 283 U.S. 564 (1931).

> "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer." Ashton v. Kentucky, 384 U.S. 195, 200 (1966).

The strict standards of overbreadth and vagueness in First Amendment cases are even stricter where a statute provides criminal sanctions. "The standard for certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanctions for enforcement." Winters v. New York, supra at page 515.

The attorney general advised the court at the bearing (sic) that his opinion as to the unconstitutionality of this statute had not changed since State v. News-Journal Corporation, supra, and therefore he did not elect to intervene to defend the statute.

Plaintiff stated that if the court found the statute on which this suit is based unconstitutional he did not desire to take further proceedings in this court and requested that his suit be dismissed with prejudice.

Accordingly, confirming the court's oral ruling made at the conclusion of the hearing, this cause is dismissed with prejudice at plaintiff's cost.

APPENDIX D

IN THE SUPREME COURT OF FLORIDA

CASE NO. 43,009

PAT L. TORNILLO, JR.,

Appellant,

vs.

THE MIAMI HERALD PUBLISHING COMPANY,
a Division of Knight Newspapers, Inc.,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that The Miami Herald Publishing Company, a division of Knight Newspapers, Inc., Appellee in this case, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Florida upholding the constitutionality of Section 104.38, Florida Statutes, which was entered in this action on July 18, 1973 and adhered to upon Petition for Rehearing on October 10, 1973.

This Appeal is taken pursuant to 28 U.S.C. §1257(2).

PAUL & THOMPSON

/s/ Dan Paul

Dan Paul

/s/ James W. Beasley, Jr.

James W. Beasley, Jr.
Counsel for Appellee

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Notice of Appeal to the Supreme Court of the United States were served by mail upon the following this 30th day of October, 1973:

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Attorney for Appellant
1492 South Miami Avenue
Miami, Florida 33130

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/s/ James W. Beasley, Jr.

APPENDIX E

FLORIDA STATUTES

97.021 Definitions

The following words and phrases when used in this code shall be construed:

(1) "Primary election" means election held preceding the general election, for the purpose of nominating a party nominee to be voted for in the general election to fill a national, state or county office. The first primary is a nomination or elimination election, the second primary is a nominating election only.

(2) "Special primary election" is a special called nomination election designated by the governor, for the purpose of nominating a party nominee to be voted on in a general or special general election.

(3) "General election" means an election held on the first Tuesday after the first Monday in November in the even numbered years, for the purpose of filling national, state and county offices and for voting on constitutional amendments as proposed by the legislature.

(4) "Special general election" is a special called election for the purpose of voting on a party nominee to fill a vacancy in the national, state or county office.

* * * *

(18) "Candidate" shall mean any person who has filed his qualification papers, and paid his qualifying fees as required by law.

770.02 Correction, apology, or retraction by newspaper

If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case shall recover only actual damages.

775.082 Penalties for felonies and misdemeanors

* * * *

(5) A person who has been convicted of a designated misdemeanor may be sentenced as follows:

(a) For a misdemeanor of the first degree, by a definite term of imprisonment in the county jail not exceeding 1 year;

(b) For a misdemeanor of the second degree, by a definite term of imprisonment in the county jail not exceeding 60 days.

(6) Nothing in this section shall be construed to alter the operation of any statute of this state authorizing a trial court, in its discretion, to impose a sentence of imprisonment for an indeterminate period within minimum and maximum limits as provided by law.

775.083 Fine in lieu of or in addition to other criminal penalty

A person who has been convicted of a crime, other than a capital felony, may be sentenced, when specifically designated by statute, to pay a fine in lieu of or in addition to any punishment described in § 775.082. Fines for designated crimes shall not exceed:

(1) $10,000, when the conviction is of a felony of the first or second degree;

(2) $5,000, when the conviction is of a felony of the third degree;

(3) $1,000, when the conviction is of a misdemeanor of the first degree;

(4) $500, when the conviction is of a misdemeanor of the second degree;

(5) Any higher amount equal to double the pecuniary gain derived from the offense by the offender or double the pecuniary loss suffered by the victim.

(6) Any higher amount specifically authorized by statute.

APPENDIX F

THE MIAMI HERALD

September 20, 1972

The State's Laws And Pat Tornillo

LOOK who's upholding the law!

Pat Tornillo, boss of the Classroom Teachers Association and candidate for the State Legislature in the Oct. 3 runoff election, has denounced his opponent as lacking "the knowledge to be a legislator, as evidenced by his failure to file a list of contributions to and expenditures of his campaign as required by law."

Czar Tornillo calls "violation of this law inexcusable."

This is the same Pat Tornillo who led the CTA strike from February 19 to March 11, 1968, against the school children and taxpayers of Dade County. Call it whatever you will, it was an illegal act against the public interest and clearly prohibited by the statutes.

We cannot say it would be illegal but certainly it would be inexcusable of the voters if they sent Pat Tornillo to Tallahassee to occupy the seat for District 103 in the House of Representatives.

APPENDIX G

THE MIAMI HERALD

September 29, 1972

FROM the people who brought you this—the teacher strike of '68—come now instructions on how to vote for responsible government, i.e., against Crutcher Harrison and Ethel Beckham, for Pat Tornillo. The tracts and blurbs and bumper stickers pile up daily in teachers' school mailboxes amidst continuing pouts that the School Board should be delivering all this at your expense. The screeds say the strike is not an issue. We say maybe it wouldn't be were it not a part of a continuation of disregard of any and all laws the CTA might find aggravating. Whether in defiance of zoning laws at CTA Towers, contracts and laws during the strike, or more recently state prohibitions against soliciting campaign funds amongst teachers, CTA says fie and try and sue us—what's good for CTA is good for CTA and that is natural law. Tornillo's law, maybe. For years now he has been kicking the public shin to call attention to his shakedown statesmanship. He and whichever acerbic prexy is in alleged office have always felt their private ventures so chock-full of public weal that we should leap at the chance to nab the tab, be it half the Glorious Leader's salary or the dues checkoff or anything else except perhaps mileage on the staff hydrofoil. Give him public office, says Pat, and he will no doubt live by the Golden Rule. Our translation reads that as more gold and more rule.

APPENDIX H

FROM: Pat L. Tornillo, Jr.,
CTA Executive Director,
and Candidate (Dem.) for
State Rep., Dist. 103
1809 Brickell Avenue
Miami, Florida 33129
Phone: 854-0220

September 30, 1972

EDITORIAL REPLY

Since the *Herald* has chosen to publicly attack my record, accomplishments, and positions on various issues, and those of the CTA, I again request that under Florida Statue 104.38, the *Herald* print the following record of affirmative and legal action.

In 1968, CTA signed a no-strike affidavit.

In 1969, CTA filed and won a suit in the Supreme Court of Florida, which gives all public employees the right to bargain collectively without the right to strike.

In 1971, CTA filed the Tornillo suit, which enabled the School Board to receive $7.6 million and are presently cooperating with the Board in their effort to retain this money and avoid further financial chaos.

Since 1968, CTA has reimbursed the taxpayers of Dade County for the full salary and all fringe benefits of its president.

Since 1970, CTA has not used the school mail service to communicate with its members.

Since 1970, CTA has paid all costs of payroll deduction of dues for its members.

We have attempted to obey all the laws of the state, not intentionally violating any, while continuing our efforts to alert the public to the impending financial crisis facing the schools.

We have, however, also retained our belief in the right of public employees to engage in political activity and to support the candidates of our choice, as is the right of any citizen in this great country of ours.

Aye, there's the rub.

• • • •

APPENDIX I

STATE v. NEWS-JOURNAL CORPORATION.

Docket 64, Page 2438.

County Judge's Court, Volusia County.

February 14, 1972.

36 Fla.Supp. 164

ROBERT DURDEN, County Judge.

This cause came on to be heard on defendant's motion to dismiss on January 21, 1972. At said hearing, the court received a stipulated statement of facts and heard argument by the Volusia County Prosecutor and counsel for defendant.

Stipulated facts

The News-Journal Corporation is a Florida Corporation which publishes the Daytona Beach Morning Journal, a daily newspaper published in Volusia County. On September 29, 1971, there was published in the Daytona Beach Morning Journal a political article written by the News-Journal political editor, Ray Ruester, entitled *Kane's City Hall Power Grab*. The subject of the article was the incumbent mayor, Richard Kane, and his alleged attempts to create a strong mayor government for the city which, by charter, has a commission manager form of government.

By a letter dated September 29, 1971, addressed to the editor, News-Journal Corporation, Richard Kane requested that pursuant to §104.38, Florida Statutes, the News-Journal Corporation immediately publish a reply to the column. The material which Mayor Kane sought to have published as his reply was attached to his letter to the editor and consisted of an article written by Richard Kane and previously published in the Halifax Reporter, a newspaper published in Volusia County, on September 4, 1971.

The News-Journal Corporation refused to publish the material as requested. Mayor Kane thereafter signed an affidavit and caused a warrant to be issued for the News-Journal Corporation for violation of §104.38, Florida Statutes.

The News-Journal Corporation filed its motion to dismiss contending, inter alia, that §104.38 is unconstitutional under article 1, §4, of the constitution of Florida, and the first and fourteenth amendments to the constitution of the United States.

Decision

§104.38, Florida Statutes, provides as follows—

> If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candi-

> date immediately publish free of costs any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall, upon conviction, be guilty of a misdemeanor.

The defendant in its motion to dismiss contends that the above-quoted statute is unconstitutional. This court agrees with the defendant for the reasons as stated herein.

First, this court recognizes that the intent of the above-quoted statute is to regulate the press which is protected by the first amendment to the United States Constitution and article 1, §4, of the Florida Constitution. The cases limiting restraint of the free press are numerous. The case of the New York Times Company v. Sullivan, 376 U.S. 254 (1964), is recognized as one of the landmark decisions in dealing with the question of freedom of the press. Mr. Justice Brennan, rendering the opinion of the court in that case, stated —

> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484, 1 L.ed. 2d 1498, 1506, 77 S.Ct. 1304. The maintenance of the opportunity for free political discussion to the

> end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the republic, is a fundamental principle of the constitutional system.

Applying the rule of law as set forth therein it is the opinion of this court that the statute in question imposes an unconstitutional infringement upon the freedom of the press.

Second, it should be recognized that the statute in question is a criminal statute, the violation of which is punishable by fine or imprisonment. It is a well settled rule of law of this state, and of all other states, that a criminal statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. Cramp v. Board of Public Instruction of Orange County, Florida, 368 U.S. 278; Aztec Motel, Inc. v. State, ex rel. Faircloth, 251 So.2d 849 (Florida Supreme Court, 1971); Burstyn, Inc. v. Wilson, 343 U.S. 495 (1951).

This court is of the opinion that the language of the statute in question is too vague, indefinite and uncertain to constitute notice of what language may fall within the purview of the statute and what constitutes a reply which must be printed at the request of candidates. This court is of the opinion that this statute is not reasonably definite and certain and that the constitutional requirement of definiteness is violated in that this statute fails to give a person of ordinary intelligence fair notice of its violation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Jurisdictional Statement were served this 19th day of November, 1973, by personal delivery, upon Mr. Tobias Simon, Attorney for Appellee, 1492 South Miami Avenue, Miami, Florida 33130.

JAMES W. BEASLEY, JR.

James W. Beasley, Jr.